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IN THE
Supreme Court of the United States

CASH AMERICA INTERNATIONAL, INC. AND
CASH AMERICA, INC. OF ALABAMA,
Petitioners,

v.

KEVIN SPARKS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court erred in failing to undertake any review of the trial court's ruling on a challenge to the constitutional excessiveness of respondent's punitive damage award.

2. Whether the punitive damage award imposed against petitioners and affirmed through the Alabama Supreme Court's silence violates petitioners' due process rights under criteria articulated in *BMW of North America, Inc. v. Gore*, particularly given the trial court's finding of no reprehensibility.

LIST OF PARTIES

The petitioners in this proceeding are Cash America International, Inc., a Texas Corporation, and one of its subsidiaries, Cash America, Inc. of Alabama. Cash America International, Inc. owns 100% of the stock of Cash America, Inc. of Alabama. No parent or publicly held company owns 10% or more of the stock of Cash America International, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION AT ISSUE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. CASH AMERICA WAS ENTITLED TO MEANINGFUL APPELLATE REVIEW OF THE TRIAL COURT'S CONSTITUTIONAL EXCESSIVENESS ANALYSIS	8
II. CASH AMERICA'S DUE PROCESS RIGHTS WERE VIOLATED AND PROPER APPELLATE REVIEW WOULD HAVE RESULTED IN A SUBSTANTIAL REMITTITUR WELL BELOW $225,000	11
CONCLUSION	13
Appendices:	
A. Memorandum Opinion and Order of the Circuit Court of Mobile County, Alabama on August 7, 1998	1a
B. Final Decision of the Supreme Court Of Alabama	18a

TABLE OF AUTHORITIES

CASES:	Page
American Pioneer Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997)	6
Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1991)	10
Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988)	11
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)	*passim*
Cash America v. Sparks, No. 1972229, 2000 WL 1880336 (Ala. Dec. 29, 2000)	10
Cooper Indus., Inc. v. Leatherman Tool Group, Inc., U.S. S. Ct. Petition No. 992035	*passim*
Ford Motor Co. v. Sperau, 517 U.S. 1217 (1996)	6
Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)	8
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	7
Johansen v. Combustion Eng's, Inc., 170 F. 3d 1320 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999)	10, 11
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	*passim*
Salve Regina College v. Russell, 499 U.S. 225 (1991)	9
Union Sec. Life Ins. Co. v. Crocker, 517 U.S. 1230 (1996)	6
Wal-Mart Stores, Inc. v. Goodman, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000)	7, 10
STATUTES AND RULES:	
28 U.S.C. § 1257(a)	1
Ala. Code § 6-11-24(b) (1993)	9

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cash America International, Inc. and Cash America, Inc. of Alabama (collectively, "Cash America" or "the company") respectfully petition this Court for a writ of certiorari to review a decision of the Alabama Supreme Court.

OPINIONS BELOW

The Alabama Supreme Court issued the opinion that is the basis of this writ on December 29, 2000 (App. 18a). The opinion is published at 2000 WL 1880336 (Ala. Dec. 29, 2000). The opinion and order of the Mobile County Circuit Court (App. 1a) is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Cash America International, Inc., is a Texas corporation engaged, through its subsidiaries, in the pawn brokerage business. Cash America, Inc. of Alabama is the company's Alabama subsidiary. (C-326-327, 329).[1] Respondent Kevin Sparks is a former management employee of Cash America who filed a lawsuit alleging he received an inadequate incentive bonus for his management services during the first nine months of 1995. He also named his supervisor, Bill Ewing, as a defendant. (C-1).

Sparks became employed by Cash America in 1987. In January 1995, Ewing was named divisional vice president for Cash America's division 5 stores located in the southeast. Sparks was promoted to one of two regional assistant vice presidents, reporting directly to Ewing. (R-154, 541). Sparks's base salary was raised by $10,000 to $58,000, among other allowances. (R-291, 293).

During the first quarter of 1995, the company began devising a new incentive bonus plan for management employees, and determined that the existing 1994 annual bonus plan would not be renewed for 1995. (R-523-524, 735-736). To ease the transition from the old bonus plan, the company authorized payment of a 9-month discretionary incentive bonus to managers for the first three quarters of 1995. (R-504, 532, 643). The company's president, Dan

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[1] "C" refers to the Mobile County Circuit Clerk's record. "R" refers to designations in the Mobile County Circuit Court trial transcript.

Feehan, notified Terry Kuntz, executive vice-president of operations, of the change in bonus structuring and expected Kuntz to disseminate this information to management. (R-524-525, 535).

In March 1995, Sparks became the only regional manager remaining in division 5, reporting directly to Ewing. (R-172-173). Sparks and Ewing both expected that Sparks would receive "a lot of incentive pay" as the only regional manager for division 5. (R-174). In October 1995, when Sparks learned that he would be receiving a 9-month incentive, he began trying to "calculate" the incentive he maintained he was "owed" under the old 1994 plan which was not in effect at the time. (R-324-325). He began collecting store productivity information on all the stores within his division from the company's home office in Fort Worth, Texas. He used this information to "calculate" a 9-month incentive in excess of $28,000. (R-326-327). Sparks candidly testified that home office was forthcoming with all information requested. (R-327-329).

The company did not agree that Sparks was "owed" a 9-month incentive in excess of $28,000. (R-334). Sparks, with Ewing's assistance, ultimately received a 9-month incentive in the amount of $7,500, more than three times higher than any incentive paid to any other regional manager during the time in question. (R-538, 756-757).

Sparks accepted the incentive, but was not satisfied and began missing significant work. Company officers became concerned and the president of the company, Feehan, asked human resources to look into the situation and attempt to assist Sparks. Feehan testified as follows:

> Well, I was, obviously, very concerned about Kevin and his situation and was very curious as to what the problems were and why—you know, why Kevin was missing work, and I asked Mr. Brockman at that time to investigate the situation and see if there is anything we

> could do. If there was a particular problem that Kevin was having, if there was anything that we could do to assist Kevin with whatever the issues were at that point.

(R-259). Feehan then requested that the human resources department go "beyond that level" and contact Sparks directly to try to convince Sparks to travel to Fort Worth and meet with Feehan personally to discuss whatever issues Sparks had. (R-529-530).

Sparks rebuffed all of Cash America's overtures. As Rob Brockman, with human resources, testified, "we made repeated attempts to contact [Sparks] and talk to him about this and to understand what was going on and we were genuinely concerned about what was happening to [Sparks] and [we didn't] understand why he was non-communicative." (R-746).

The company's home office attempted to set up three meetings with Sparks, at the company's expense, but on each occasion Sparks refused to meet with the company. It also sent a human resources representative from home office to Mobile to assist Sparks. Sparks did not even mention the incentive bonus plan at their meeting. (R-748-755).

The case proceeded to trial in June 1998. The jury awarded Sparks $150,000 in compensatory damages, and $1 million in punitive damages, on the theory that Sparks was defrauded during the bonus process. The jury exonerated Sparks's supervisor, Bill Ewing. (R-927).

In post-judgment proceedings, circuit court judge Christopher Galanos conducted a review of the punitive award for excessiveness under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and found none of the aggravating factors which would support a significant sanction in addition to compensatory damages. The court wrote:

> In *BMW*, the United States Supreme Court noted that the most important indicium of the reasonableness of a

punitive damage award is the degree of reprehensibility of the defendants' conduct. *See BMW*, 116 S. Ct. at 1599. It is clear from the holding in *Talent Tree* and *American Pioneer*, that to sustain an award of punitive damages, there must be a showing of malice or reprehensible conduct and these elements are absent in the present case.

. . .

The testimony provided very little evidence of conduct on the part of the defendants that the jury could have determined was gross, oppressive, or malicious. . . . The Alabama Supreme Court has recognized that torts causing only economic injury are less worthy of large punitive damages awards than torts inflicting injuries to health or safety. *See American Pioneer Ins. Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997).

. . .

The parties conceded that there was no similar past conduct involving the payment of an incentive bonus payment. . . In this case, the plaintiff failed to introduce evidence of prior misconduct and failed to present substantial evidence to support his claim that other employees suffered damages as a result of the defendants' conduct.

. . .

[T]he defendants attempted to meet with the plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The plaintiff admittedly refused to meet with Mr. Feehan at Cash America's expense.

. . .

[T]he plaintiff gave the defendants little or no opportunity to remedy the wrong.

(App. 10a-15a) (emphasis added). Nevertheless, Judge Galanos allowed Sparks's punitive award to stand, but

reduced it to $225,000, almost a quarter of a million dollars.[2] (App. 17a). Cash America noticed its appeal to the Alabama Supreme Court on September 9, 1998, and specifically requested that the court undertake a plenary review of Sparks's punitive award for excessiveness, under both federal and Alabama authorities. On December 29, 2000, the Alabama Supreme Court released its final decision (App. 18a) affirming the judgment as remitted by the trial court. The Alabama Supreme Court conducted no analysis of the punitive damage award. The court utterly failed to address or even cite *BMW v. Gore*, and undertook no appellate review of the trial court's remittitur analysis.

The only reference to punitive damages in the Alabama Supreme Court's decision was within the context of Cash America's motion for judgment as a matter of law on Sparks's punitive damage claim. On that issue, the court sustained without analysis the trial court's denial of Cash America's motion because, the court held, the record contained "substantial evidence" in support of the punitive claim. (App. 22a-23a).

REASONS FOR GRANTING THE WRIT

This case presents yet another chapter in Alabama's troubled history of due process violations associated with unwarranted punitive damage awards.[3] Ignoring clear constitutional authority to the contrary, in this case the Alabama Supreme Court failed to undertake any review of the excessiveness of a punitive award grossly out of

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[2] The trial court also remitted Sparks's compensatory award to $75,000. (App. 17a).

[3] *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 517 U.S. 1231 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 517 U.S. 1230 (1996); *Ford Motor Co. v. Sperau*, 517 U.S. 1217 (1996).

proportion to the gravity of the allegedly offensive conduct. The decision should be vacated and the Alabama Supreme Court should be required to perform its constitutional duty.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-23 (1991), this Court emphasized the critical importance of thorough appellate review of the excessiveness of punitive awards to insure compliance with due process. Moreover, this Court now has accepted certiorari in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035, in order to clarify the standard that the appellate courts must apply in reviewing punitive damage awards for excessiveness under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

The instant case presents an even more pressing problem than that in *Cooper Industries*, inasmuch as the Alabama Supreme Court failed to undertake *any* review of the trial court's excessiveness analysis. In a recent, strongly worded opinion, the Alabama Supreme Court has even acknowledged its constitutional responsibility to review *BMW v. Gore* determinations. *See Wal-Mart Stores, Inc. v. Goodman*, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000) (ordering significant remittitur and holding that a failure to accord plenary review of trial court's excessiveness determination would be an "abdicat[ion] of our responsibilities under *BMW*"). Cash America's constitutional due process rights, nevertheless, were ignored entirely by the Alabama Supreme Court. This Court now has an opportunity to redress this violation, as well as to provide needed guidance to the Alabama Supreme Court, which gave rise to the *BMW v. Gore* decision in the first place.

Meaningful appellate review is the primary check on runaway juries. *See Haslip, supra*; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). While the petitioner in the *Cooper Industries* case has urged this Court to adopt a stringent *de novo* standard of review applicable to all

appellate courts, and argues persuasively for such a result, Cash America was not even given the benefit of the scant review accorded petitioners in *Cooper Industries*. Meaningful appellate review plainly would have resulted in a substantial remittitur of the punitive award well below $225,000. The record is devoid of any significant evidence of aggravating factors associated with reprehensibility or recidivism, as the trial court meticulously recorded but erroneously failed to redress adequately.

I. CASH AMERICA WAS ENTITLED TO MEANINGFUL APPELLATE REVIEW OF THE TRIAL COURT'S CONSTITUTIONAL EXCESSIVENESS ANALYSIS

This Court specifically instructed the Alabama Supreme Court in *BMW v. Gore*, *supra*, to undertake a thorough constitutional due process analysis of all punitive damage awards, in consideration of three "guideposts" articulated by this Court. Before that, in *Haslip*, this Court recognized the necessity of appellate review to safeguard against due process violations. In Alabama, the jury is not permitted to perform any constitutional excessiveness analysis, so that the trial court is the primary arbiter for purposes of correcting excessive awards. *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). The present case illustrates the critical importance of meaningful appellate review of the trial court's due process analysis.

As this Court clearly recognized in *Haslip*, the importance of meaningful appellate review of punitive damages awards cannot be over-emphasized. There, this Court sustained the award at issue, in large part because of the thorough appellate review accorded to petitioner by the Alabama Supreme Court:

> Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards.

. . .

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion.
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> . . .
>
> This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.
>
> . . .
>
> Also . . . the Supreme Court of Alabama ha[s] elaborated and refined the *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution.
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> . . .
>
> The Alabama Supreme Court's post verdict review ensures that punitive damages awards are not grossly out of proportion to the offense.
>
> . . .
>
> Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections.

Haslip, 499 U.S. at 20-23. Thus, respondents in *Haslip* avoided a constitutional rebuke primarily as a result of Alabama's demonstrated appellate safeguards, which operated to hold the constitutional line with respect to respondents' punitive award. Cash America waited 2½ years to see those safeguards work properly while the Alabama Supreme Court held its case, only to be denied even a rudimentary review.[4] *See also Salve Regina College v.*

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[4] The Alabama legislature has attempted to legislate a stringent *de novo* standard of appellate review of punitive damages for excessiveness. *See Ala. Code* § 6-11-24(b) (1993) ("The appellate court shall independently reassess the nature, extent and economic impact of [a punitive] award and reduce or increase the award in light of all evidence.") But the Alabama Supreme Court eviscerated the statute, deciding the statute could only

Russell, 499 U.S. 225, 231 (1991) (extolling the virtues of independent appellate review of legal issues before multijudge panels).

The petitioner in *Cooper Industries* stresses that the Circuit Courts of Appeal, as well as the State appellate courts, are divided with respect to what type of standard of review must be applied to a trial court's excessiveness analysis. Cash America got *no* review. If this Court does not accept certiorari and vacate the Alabama Supreme Court's decision, Alabama will perhaps stand alone as the one jurisdiction wherein *no* appellate review of the *BMW v. Gore* factors is consistently required. *Compare Cash America v. Sparks*, No. 1972229, 2000 WL 1880336 (Ala. Dec. 29, 2000), *with Wal-Mart v. Goodman, supra* (recognizing Alabama Supreme Court's constitutional obligation to provide meaningful review of trial court's *BMW v. Gore* analysis).[5] This result is untenable, particularly given Alabama's troubled history in dealing with grossly excessive punitive damage awards.

The Eleventh Circuit has articulated a *de novo* review standard for excessiveness determinations. *See Johansen v. Combustion Eng's, Inc.*, 170 F. 3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). The Alabama Supreme Court articulated a similar standard which it applied in *Wal-Mart v. Goodman, supra*. Under this standard, the lower court's underlying factual findings are reviewed for clear

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mean that the appellate courts (as with every case) must remain "free from improper influences." *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991).

[5] Constitutional due process and equal protection concerns also are implicated by the Alabama Supreme Court's apparently arbitrary practice of providing meaningful appellate review of the *BMW v. Gore* factors for certain defendant/appellants, such as Wal-Mart, but providing no appellate review for other similarly situated defendant/appellants, such as Cash America.

error, but the ultimate constitutional inquiry is conducted *de novo*. *Johansen*, 170 F. 2d at 1334. This standard avoids the constitutional hazards lurking behind deferential standards of review, as petitioners argued convincingly in the *Cooper Industries* case. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (appellate review must be sufficient to "insure[] that punitive damage awards are not grossly out of proportion to the severity of the offense"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87-88 (1988) (O'Connor, J. concurring) (substantial and unpredictable impact of windfall recoveries from punitive damages necessitates careful appellate scrutiny of such awards).

Cash America respectfully submits that this writ should issue, the decision should be vacated, and the Alabama Supreme Court should be required to conduct a proper review of this punitive award in compliance with this Court's decision in *BMW v. Gore* and the anticipated decision in *Cooper Industries*.

II. CASH AMERICA'S DUE PROCESS RIGHTS WERE VIOLATED AND PROPER APPELLATE REVIEW WOULD HAVE RESULTED IN A SUBSTANTIAL REMITTITUR WELL BELOW $225,000

Two hundred twenty-five thousand dollars is a breath-taking fine to levy against defendants that, as meticulously recorded by trial court, evinced very little, if any, evidence of aggravating factors associated with reprehensible conduct. The first, and most important, of the *Gore* guideposts is the reprehensibility, or lack thereof, of the defendant's conduct. Thus, not every punishable act is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. . . [P]unitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576.

Here, the trial court's *BMW v. Gore* analysis, from a factual standpoint, is not clearly erroneous in its finding of neither reprehensibility nor any significant evidence of the other *BMW v. Gore* aggravating factors. But the court misapplied *BMW v. Gore* by allowing a $225,000, three-to-one punitive award to stand despite the complete lack of reprehensibility on the part of Cash America. "Both unlimited judicial discretion," as well as unlimited jury discretion in the fixing of punitive damages "may invite extreme results" that offend constitutional due process. *Haslip*, 499 U.S. at 18. As the Court wrote in *BMW v. Gore*, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582.

The converse proposition is equally true. Thus, where, as in the instant case, the jury awards relatively high compensatory damages (here, $150,000 as remitted to $75,000) for conduct that bears none of the aggravating factors associated with reprehensibility, a three-to-one punitive damage ratio is constitutionally excessive. This Court wisely has rejected a "mathematical bright line" approach to fixing punitive damages. The three-to-one ratio imposed by the trial court in this case and affirmed through the Alabama Supreme Court's silence should not stand.

Petitioners in *Cooper Industries* argued persuasively that admitting and accepting responsibility for offensive conduct should lower the constitutional limit of any punitive award. Cash America proved that it did not engage in oppressive conduct. Indeed, while Sparks was an employee and before litigation was even threatened, Cash America undertook every possible affirmative step to address Sparks's concerns but Sparks would not permit any remedial action, as the trial court noted. Sparks rebuffed Cash America on every occasion, opting instead to take his chances with a large

punitive award. Clearly, Cash America had no notice that a $225,000 punitive fine would be imposed against it for paying a 9-month premium management incentive of $7,500 to Sparks and thereafter making every effort to reach out to him—including directly involving the company president—when he did not respond.

As the petitioners in *Cooper Industries* argued cogently, the appellate courts cannot simply pay lip service to the constitutional mandate announced in *BMW v. Gore*, *supra*. The Alabama Supreme Court's decision should be vacated, and the Alabama Supreme Court should be instructed to undertake a proper analysis of the *BMW v. Gore* factors. Such appellate review would have resulted in a substantial remittitur of the $225,000 punitive award, which the trial court improperly allowed to stand given the dearth of reprehensibility in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2001

APPENDIX A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV 97-683

KEVIN SPARKS

Plaintiff,

vs.

CASH AMERICA OF ALABAMA, INC., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

I. PROCEDURAL HISTORY

The Plaintiff, Kevin Sparks, filed this breach of contract and fraud action against the Defendants, Cash America of Alabama, Inc., Cash America International, Inc., and Bill Ewing, on March 3, 1997. A trial by jury was held in this case beginning on June 2, 1998. The jury returned a verdict on June 5, 1998, in favor of the Plaintiff and against the Corporate Defendants in the amount of $1,150,000. The jury found in favor of the individual Defendant, Bill Ewing. The verdict included an award of compensatory damages in the amount of $150,000 and punitive damages in the amount of $1,000.000. This matter came before the Court on the Defendants' Motion for Judgment as a Matter of Law, or in the alternative, for a Remittitur or New Trial. The post-judgment motion was heard by this Court on July 10, 1998. After due consideration of the content of the motion, the Plaintiffs response, the arguments of counsel, and controlling precedential authority, this Court is of the opinion that Defendants' Motion for Judgment as a Matter of Law is due to be and is hereby DENIED, Defendants' Motion for a New

Trial is due to be and is hereby DENIED, but the Motion for Remittitur of Damages is due to be granted for the reasons hereinafter set forth..

II. STATEMENT OF FACTS

The Plaintiff, Kevin Sparks, contended that employees of Cash America fraudulently misrepresented and/or concealed the fact that he would not receive an incentive bonus to which he was entitled under the incentive bonus plan in effect at the time of his employment. Plaintiff also claimed that the Defendants committed a breach of contract by refusing to comply with the provisions of the 1994 incentive bonus plan.

The Plaintiff claimed that he relied upon certain representations made by employees of Cash America, including his supervisor, Bill Ewing, to the effect that he would receive an incentive bonus payment pursuant to the terms of the 1994 bonus plan if he agreed to accept a position as a region manager. The amount of the bonus for the first nine months of 1995 as calculated under the performance factors of the 1994 bonus plan was in excess of $32,000. However, the Plaintiff subsequently received a bonus in the amount of $7,500. The Plaintiff claimed an out-of-pocket loss of $25,000 and unspecified damages for mental anguish. The Defendants claimed that the 1994 bonus plan contained objective and discretionary factors and the $7,500 bonus award was based in part on the "discretionary" factors. The Defendants also claimed that the Plaintiff was never promoted to the position of "region manager" over all of Division Five, but served as an assistant to the vice president of the Division, with supervisory authority over only half of the stores in that Division. Therefore, in addition to the Defendants' claim that payment of the bonus was discretionary, they farther asserted the Plaintiff was entitled to a bonus only on the stores that he directly supervised in Division Five.

III. CONCLUSIONS OF LAW

This Court finds no merit in the Defendants' arguments that the Plaintiff failed to present clear and convincing evidence to support an award of punitive damages or substantial evidence in support of the claims for fraud or breach of contract. This Court finds that the testimonial and documentary evidence presented at trial was sufficient to support the Plaintiffs claims for fraud and breach of contract and that there was evidence from which a jury could reasonably infer that the Defendants' conduct was gross, oppressive, or malicious justifying an award of punitive damages. This Court, however, finds that the award of compensatory and punitive damage awards were grossly excessive.

A. The award of compensatory damages in this case is excessive

The jury awarded the Plaintiff $150,000 in compensatory damages in this case. The Plaintiff claimed his out-of-pocket loss was approximately $25,000. Therefore, the jury's verdict included an award of $125,000 for "mental anguish." The Alabama Supreme court has recently addressed the issue of the excessiveness of compensatory damages in *K-Mart Corp. v. Kyles*, 1998 WL 258183 (Ala. May 22, 1998). In that case, the plaintiff claimed she was maliciously prosecuted after K-Mart accused her of shoplifting. The jury returned a verdict in her favor awarding compensatory damages in the amount of $100,000 and punitive damages in the amount of $100,000. The evidence at trial demonstrated that the plaintiff spent approximately three hours in jail after having been processed and fingerprinted and paid $4000 in out-of-pocket expenses to hire an attorney and to obtain bail before her criminal case was ultimately "no billed."

The Supreme Court reversed entry of the judgment in favor of the plaintiff, reasoning that the plaintiffs alleged mental

anguish was not severe enough based on the evidence to warrant a $100,000 compensatory damage award. The Court held:

> We give stricter scrutiny to an award of mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced
>
> * * * *
>
> Thus, in light of the paucity of the evidence presented by the plaintiff in this case, we conclude that the jury abused its discretion in awarding her $100,000 in compensatory damages . . . . We believe that the greatest amount of compensatory damages a jury, using sound discretion, could have awarded was $15,000. Accordingly, we conclude that the trial court erred in denying the defendant's motion for a remittitur of damages or a new trial.

The Court also noted that mental anguish is not an item for which a "precise amount of damages can be assessed" *K-Mart, Id.*, at *8. In considering whether a jury verdict for compensatory damages is excessive, the evidence must be viewed from the plaintiffs perspective and a determination made as to what the evidence supports in terms of the plaintiff's suffering. *K-Mart, Id.*, at *8.

The nexus between the allegations and proof of mental anguish is tenuous. With regard to the Plaintiffs testimony, he could only say that the Defendants' conduct made him feel "as if his arms and legs had been cut off and all he could do was lie on the couch." The Plaintiff then attempts to give his subjective symptoms a ring of truth by connecting them to the expert testimony of Dr. Sullivan, who treated the Plaintiff from December 8, 1995, to April 12, 1996. Dr. Sullivan treated the Plaintiff, shortly after he received the bonus check, for stress-related anxiety, a sleep disorder, and high blood

pressure. Dr. Sullivan saw the Plaintiff several times over a matter of months and attributed the symptom to work-related factors based on a medical history given by the Plaintiff. However, when asked what the genesis of the problems were, Sullivan replied that he could not say with "a hundred percent certainty that work related stress was the cause of the Plaintiffs symptoms. On cross examination, Sullivan admitted that Sparks *never* mentioned a problem with incentive bonus payments in the history he gave the doctor. He also admitted that the Plaintiffs cigarette smoking and coffee drinking could have caused or contributed to his symptoms. Much of Dr. Sullivan's testimony results in opinions premised on speculation, not a reasonable degree of medical certainty. The law forbids awarding damages of a speculative or conjectural nature.

This Court concurs that the jury reasonably inferred that the Plaintiff suffered some measure of mental anguish from the realization that he was receiving a much lower bonus payment than that promised and expected. However, even when viewed in a light most favorable to the Plaintiff the paucity of the evidence presented does not support an award of $125,000, for mental anguish. This Court believes that the greatest amount of compensatory damages a jury, using sound discretion, should have awarded the Plaintiff is $75,000 and, accordingly, reduces the jury's compensatory damage award to $75,000.

B. The award of punitive damages in this case is excessive.

In *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1995), the Supreme Court addressed the constitutional challenge to punitive damage awards and announced a decision requiring states to judicially review jury verdicts that award punitive damages to determine whether such verdicts violate the tortfeasor's rights under the Due Process Clause of the United States Constitution. The Supreme Court emphasized that this post-verdict judicial review must be

meaningful, with special emphasis being given to three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; and (3) a comparison of the amount of the jury's verdict with civil or criminal penalties (if any) that could be imposed under the law for comparable misconduct. *BMW*, *Id.*, at 1598-1603.

In Alabama, the Supreme Court has instituted certain "protections" in an effort to assess the constitutionality of a punitive damages award. These factors are commonly referred to as the "*Hammond/Green Oil* factors." *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). The commonly cited factors are: (1) the harm likely to occur and the harm that actually occurred; (2) the degree of reprehensibility of the defendant's conduct; (3) the financial gain to the defendant from the behavior; (4) the financial position of the defendant; (5) the cost of litigation; (6) any available criminal sanctions; and (7) similar civil actions.

While the United States Supreme Court has mandated an analysis pursuant to the factors cited above, it did not prohibit the consideration of other factors as well. The courts of this state continue to utilize the factors set down in *Hammond* and *Green Oil*, as well as the factors set out in Ala. Code §6-11-23(b)(1975). *See American Pioneer Life Insurance Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997); *Talent Tree Personnel Services v. Pleenor*, 703 So. 2d 917 (Ala. 1997). The Alabama Supreme Court has recently addressed the excessiveness of punitive damages under the analysis mandated by the Court in *BMW* in two cases involving employer/employee related disputes over the payment of sales commissions. *American Pioneer*, *Id.*; *Talent Tree*, *Id.* The facts of those cases are similar to those in this case.

In *Talent Tree*, a sales representative for an employment agency sued her employer and the employer's office manager for damages based on fraudulent misrepresentation and suppression. She alleged that the defendants had manipulated her quarterly sales figures in order to cheat her out of sales commissions. The jury found for the employee, awarding her $300,000 in compensatory damages and $3,000,000 in punitive damages. The trial court reduced the punitive damages award to $2,000,000 before appeal. The employee presented documents showing that her sales figures had been reduced without her knowledge, that upper-level management had crossed out some figures and arbitrarily replaced them with lower figures, that her commission calculations had been retroactively reduced by applying the higher quota requirements of an account executive, and that certain new accounts she had established either had not been credited to her commission calculation or had been removed from that calculation after the fact. The result was that the employer had underpaid her commissions for the time period in question. On appeal, the defendants argued that the award of $2,000,000 was unconstitutionally excessive in light of the *BMW* case. The Alabama Supreme Court agreed and ordered a reduction of the award to $1,500,000.

In applying the factors set down in *BMW*, *Hammond*, *Green Oil*, and Ala. Code § 6-11-23(b)(1975), the court found: (1) there was no evidence of prior misconduct; (2) the employer, had for the most part, complied with the employee's discovery requests, but failed to provide one document showing that her sales figures had been intentionally lowered; (3) the employee gave the defendants a reasonable opportunity to remedy the conduct; and (4) the employer concealed its conduct by failing to disclose the reduction in the employee's sales commissions.

Under the second prong of the *BMW* analysis, the court found that a 5 to 1 ratio of punitive damages to compensatory

damages was reasonable under the circumstances of the case. Under the third prong of the *BMW* analysis, the court noted that the criminal penalty that could be imposed in this case, theft by deception of more than $1,000, was a class B felony, punishable by 2 to 20 years imprisonment. Compared to this criminal sanction, the court found that the punitive damage award was not excessive.

The Court also considered the additional factors set out in *Green Oil*. The court noted that the mental anguish the employee suffered, the employer's reckless disregard for her economic rights, and the existing criminal sanctions established a reasonable relationship between the award and the harm that occurred and that was likely to occur. The court also found that the defendant stood to profit from the wrongful conduct, the award would have little impact upon the financial position of the employer, and no criminal sanctions or other civil actions were pending against the employer. Based on its analysis, the court lowered the punitive damages award from $2,000,000 to $1,500,000.

In *American Pioneer*, an employer/employee dispute over sales commissions, the court ordered the reduction of punitive damages from $2,000,000 to $750,000. The employee contracted with the employer to sell its insurance products in 1984, and did so until 1988, when he was terminated for a lack of production. He was rehired in May of 1988 and sold for the employer until he was again terminated in April of 1989 for a lack of production. He received a letter from the employer shortly after his termination informing him that it was invoking the "forfeiture of commissions" clause in his contract and that he would no longer be entitled to receive commissions on insurance policies already in place. The employer stated that it was invoking the provision because the plaintiff employee had replaced a client's policy with an insurance product from another insurance carrier. According to the evidence, the forfeiture clause was invoked without any

investigation on the part of the employer to determine if the employee had "induced" the client to replace the employer's policy. After his commissions were terminated, the employee sued the employer for breach of contract and fraud. He was awarded $250,000 in compensatory damages and $3,000,000 in punitive damages. The trial court reduced the punitive damages award to $2,000,000 prior to the appeal.

Under the reprehensibility prong of the *BMW* analysis, the court noted that the employee's damage was economic and did not endanger his health or safety, his commissions would have declined over time, even if the forfeiture provision had not been invoked, and, although the employee asserted that other agents received similar treatment, he failed to prove this at trial. The court noted that the degree of reprehensibility of the employer's conduct in this case would have been seen as much greater if the employee had proven that the employer had treated other agents similarly.

Under the second prong of the *BMW* analysis, the original punitive damages award was eight times the amount of the compensatory damages award. The court considered the reduction, establishing a 3 to 1 ratio ($750,000 to $250,000), reasonable in this case. Under the third prong of the *BMW* analysis, the court noted the lack of criminal or other civil actions being taken against the defendant. Finally, the court noted the employer's financial condition, finding that an award of $750,000 would eliminate any profit realized by the employer. Also, the $750,000 represented approximately 1% of the net worth of the employer at the time of the wrongful conduct and 11% of their cash surplus reserves and, therefore, the payment of the $750,000 would not impair their ability to conduct business with their insureds. The Alabama Supreme Court affirmed the award of compensatomy damages and ordered a remittitur of the punitive damages form $2,000,000 to $750,000.

This Court first observes that the facts of the instant cause are not nearly as egregious as those in either *Talent Tree* or *American Pioneer*. Moreover, the analysis mandated by the precedential authorities previously cited leads to the conclusion that the jury's award of $1,000,000 in punitive damages is excessive and reduces it to $225,000. The basis for this conclusion is set forth below.

1. Degree of reprehensibility of the defendant's conduct

In *BMW*, the United States Supreme Court noted that the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. *See BMW*, 116 S.Ct., at 1599. It is clear from the holding in *Talent Tree* and *American Pioneer*, that to sustain an award of punitive damages there must be a showing of malice or reprehensible conduct and these elements are absent in the present case. The Plaintiff directed his claims specifically to actions taken by Terry Kuntz, Bill Ewing, Dan Feehan, Kim McClendon, and Rob Brockman.

Terry Kuntz, who served as vice president of operations during the time period in question, was alleged to have defrauded and deceived the Plaintiff by promising to compensate him under the 1994 plan, which induced the Plaintiff to relocate to Mobile and accept a promotion to region manager in January of 1995. However, Mr. Kuntz was not named in the Plaintiffs lawsuit, nor was he called as a witness by the Plaintiff. The only evidence presented of Kuntz's alleged representations were conversations between the Plaintiff and Kuntz in which the Plaintiff alleges Kuntz made the statements. In the absence of Kuntz's testimony or substantial documentary evidence, this Court finds no basis to conclude that Kuntz's conduct was reprehensible.

Bill Ewing served as supervisor to the Plaintiff during the time period in question. The Plaintiff contends that Ewing misrepresented the Plaintiffs status as a region manager and

fraudulently represented to the Plaintiff that he would receive a bonus based on all of Division Five. The jury, however, found in favor of Bill Ewing on the claims asserted against him in his individual capacity. Also, it was Ewing who recommended an increase in the bonus paid to the Plaintiff from $6,000 to $7,500. Even if the claims made by the Plaintiff against Ewing are true, the Court is not persuaded that said comments were made with an oppressive or malicious intent, because it was Ewing who persuaded management to enhance Plaintiff's bonus.

Dan Feehan was president of the Defendant corporation during the time period in question. Feehan admitted that the corporation erred in failing to communicate to employees the fact that the 1994 bonus plan would not be used in 1995. The decision to terminate the 1994 plan, which was made at some point in the early part of 1995, was admittedly not communicated to all employees. The jury reasonably inferred that the actions of the corporation in failing to communicate the termination of the 1994 bonus plan to the Plaintiff were oppressive and malicious under the circumstances. However, this Court notes, and Plaintiff admits, that Feehan attempted to schedule several meetings with the Plaintiff in November and December of 1995 and January of 1996 to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with Feehan.

Rob Brockman and Kim McClendon worked at Cash America headquarters. The Plaintiff claimed that they sent him information which led him to believe that he was going to get a larger bonus than he received. However, both testified, and the Plaintiff admitted, that they provided him with all of the statistical and financial information that he requested. The Plaintiffs accessibility on demand to the financial data he requested persuades this Court that the representations of Brockman and McClendon lacked oppressive or malicious intent.

The testimony provided very little evidence of conduct on the part of the Defendants that the jury could have determined was gross, oppressive, or malicious. The acts complained of in this case were clearly not as egregious and malicious as the acts complained of in the *American Pioneer* and *Talent Tree* cases. The Defendants, as well as co-employees of the Plaintiff, testified that the 1994 plan contained discretionary factors in addition to objective criteria. Also, the harm suffered in this case was purely economic and amounted to a loss of approximately $24,500. The Alabama Supreme Court has recognized that torts causing only economic injury are less worthy of large punitive damages awards than torts inflicting injuries to health or safety. *See American Pioneer Life Insurance Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997). The Court also notes that the bonus received by the Plaintiff was twice as much as the next highest award received by a region manager. In addition, this Court has closely reviewed the documentary evidence submitted in this case, but found no further justification for the large punitive damages award. Taking these facts into consideration, this Court cannot reconcile the large punitive damages award with the evidence adduced at trial and the law of this jurisdiction.

In assessing the reprehensibility of the defendant's conduct, the courts have also considered the following factors.

a. Duration of the conduct

The Plaintiff contends that the conduct in this case lasted for approximately one year. Plaintiff contends that the Defendants knew that the 1994 plan would not be carried over to 1995 as early as December of 1994 or January of 1995 and, therefore, were aware that the Plaintiff would not receive the bonus for almost a year before he was actually notified. In *Talent Tree*, the conduct occurred over a three month period, so the duration of the alleged wrongful conduct in this case is of sufficient duration to sustain the imposition

of an award of punitive damages, though not the amount awarded by the jury.

b. Degree of defendants' awareness of any hazard which his conduct has caused or is likely to cause

Defendants contend that they did not intentionally act to deprive the Plaintiff of the bonus payment to which he alleged he was entitled. However, they stated that the employees should have been informed about the status of the incentive bonus plan, but admittedly failed to provide such notification for one reason or another. In *Talent Tree* and *American Pioneer*, there was concrete evidence of the defendants' malicious and egregious conduct and their knowledge of the hazard their conduct had caused. In this case, the Defendants' knowledge of the hazard their conduct was likely to cause is based mainly on the testimony of the Plaintiff. However, the evidence presented at trial, could have supported a reasonable inference by the jury that the Defendants were aware of the hazard that their conduct was likely to cause and could have provided support for the award of punitive damages in this case.

c. Any concealment or "cover up" of the hazard

Plaintiff contends that the Defendants attempted to "cover up" the fact that the Plaintiff would not receive the bonus payment to which he alleges he was entitled. The Plaintiff has cited a page from Bill Ewing's day planner which he contends was evidence of Ewing's knowledge that the Plaintiff's bonus would be less than had been represented to him. Also, the Plaintiff has cited the fact that Plaintiff was paid a bonus in October of 1995 based on calculations of the entire region. The Court concludes that the pages from the day planner were inconclusive. The defense witnesses testified that the October bonus payment was simply a miscalculation. While the October payment could certainly

allow the jury to make an inference that the Defendants recognized the Plaintiff as supervising all of his region and that their actions in conjunction therewith were malicious or oppressive, the Court notes that the Defendants provided the Plaintiff with all the financial and statistical information related to the bonus payment which he requested. Further, the Defendants attempted to meet with the Plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with representatives of Cash America. While there was evidence presented from which the jury could have inferred a "cover up," this Court finds more credible the evidence that representatives of the Defendants repeatedly sought to meet with the Plaintiff to identify and resolve their differences, but the Plaintiff repeatedly refused.

d. Existence and frequency of similar past conduct

The parties conceded that there was no similar past conduct involving the payment of incentive bonus payments. The Alabama Supreme Court has stated that the degree of reprehensibility of a defendant's conduct would "be seen as much greater" if the defendant could prove a pattern and practice of similar conduct. *American Pioneer Life Ins. Co. v. Williamson, Id.*, at 1365-66. In this case, the Plaintiff failed to introduce evidence of prior misconduct and failed to present substantial evidence to support his claim that other employees suffered damages as a result of the Defendants' conduct. Thus, the Plaintiff failed to prove a pattern and practice of wrongful conduct.

e. Quality and quantity of rights of others that were disregarded by the defendant

The Plaintiff alleges that over eighty employees suffered economic damages as a result of the Defendants' conduct. However, as stated above, the Plaintiff failed to present substantial evidence in support of this claim. Also, the parties

acknowledged that no other lawsuits have been filed or complaints lodged against the Defendants for the failure to pay incentive bonuses. The Court finds this to be a mitigating factor in support of Defendants' argument that the award of punitive damages was excessive in this case.

f. Nature and extent of efforts on the part of the defendant to remedy the wrong

As previously stated, the Defendants attempted to meet with the Plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with Mr. Feehan at Cash America's expense. Moreover, the Defendants sent Mr. Brockman to Mobile in November of 1995 to meet with the Plaintiff. It is uncontested that the subject of the incentive bonus payment was never mentioned at this meeting. The Defendants clearly made some effort to address the problems that had arisen regarding the bonus payment. This factor would also serve as a mitigating factor in support of the Defendants' argument that the award of punitive damages was excessive in this case.

g. Opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong

As discussed above, the Plaintiff gave the Defendants little or no opportunity to remedy the wrong. This factor weighs against the Plaintiff in this Court's analysis of the reprehensibility of the Defendants' conduct.

2. Ratio between the amount of compensatory damages and punitive damages awarded

The ratio of punitive damages to compensatory damages now stands at 6.6 to 1. This Court has reviewed current case law and notes that the ratio of punitive damages to compensatory damages generally falls below 12 to 1. In

American Pioneer and *Talent Tree*, the court approved ratios of 3 to 1 and 5 to 1, respectively. While recognizing that there is no set mathematical formula for determining an award of punitive damages, the Alabama Supreme Court has suggested a ratio of 3 to I as a "benchmark" from which to determine reasonableness and fair punishment. *See Union Security Life Ins. Co. v. Crocker*, 709 So. 2d 11 18 (Ala. 1997); *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. 1997); *Bryant v. Bryant Welding & Indus. Maintenance, Inc.*, 710 So. 2d 900 (Ala. Feb. 27, 1998). Careful consideration of the facts of the instant case coupled with the ratios found appropriate in the *American Pioneer* and *Talent Tree* cases, this Court determines that a 3 to 1 ratio is appropriate in this case.

3. Difference between the punitive damages award and the civil or criminal sanctions that could be imposed for comparable misconduct

The parties have agreed that there are no criminal or civil sanctions that could have been imposed against the Defendants in this case for their alleged conduct.

4. Profitability of the defendant's conduct

The Plaintiff contends that he suffered approximately $25,000 in damages and that the other eighty employees affected by the termination of the 1994 plan suffered damages in the amount of $88,000. Assuming for the sake of argument that the Plaintiffs calculations are accurate, the Defendants recognized a profit of approximately $113,000. Therefore, any punitive damages award in excess of this amount would remove any profit the Defendants received as a result of their conduct.

5. Defendants' financial condition

The Defendants are large corporations with revenues and profits reaching millions of dollars each year. An award of

$1,000,000 in this case would have little impact upon the Defendants' financial positions.

After due consideration of the factors and precedential authorities herein cited, this Court concludes that the jury's award of $150,000.00 in compensatory damages and $1,000,000.00 in punitive damages is not supported by the facts or the law.

Accordingly, it is ORDERED that the amount of compensatory damages be and hereby is reduced to $75,000.00 and the amount of punitive damages be and is hereby reduced to $225,000.00 for a total award to the Plaintiff of $300,000.00

Done and ORDERED on this the 7th day of August, 1998

/s/ Chris N. Galanos
CHRIS N. GALANOS
Circuit Judge

APPENDIX B

SUPREME COURT OF ALABAMA

1972125

KEVIN SPARKS

v.

CASH AMERICA INTERNATIONAL, INC., *et al*,

1972229

CASH AMERICA INTERNATIONAL, INC., *et al*.

v.

KEVIN SPARKS

Appeals from Mobile Circuit Court

(CV-97-683)

ON APPLICATION FOR REHEARING

PER CURIAM.

The opinion of October 27, 2000, is withdrawn, and the following opinion is substituted therefor.

Kevin Sparks filed this breach-of-contract and fraud action against his former employer, Cash America of Alabama, Inc.; the employer's parent corporation, Cash America International, Inc.; and his supervisor, Bill Ewing, on March 3, 1997. We affirm conditionally.

Cash America International owns and operates pawnshops worldwide. Cash America of Alabama, an Alabama

corporation, operates the pawnshops in Alabama, with a place of business in Mobile County. Sparks, a management employee, had worked at a number of Cash America locations in various states. When the dispute at issue in this action arose, Sparks was working out of the Mobile County location.

Sparks received an annual salary; based on his job performance, he was also eligible to receive incentive bonuses, pursuant to Cash America International's incentive-bonus plan. A dispute arose concerning bonuses that Sparks claimed Cash America International and Cash America of Alabama (hereinafter sometimes collectively referred to as "Cash America") owed him. Sparks sued, alleging that during 1994 and 1995 he had received inadequate incentive-bonus payments while he was a management employee of Cash America. In addition, he alleged that Cash America had converted certain incentive bonuses and certain items of personalty. Finally, Sparks alleged that Cash America had breached a contract by refusing to comply with the provisions of a 1994 incentive-bonus plan.

Sparks claimed he had relied upon certain representations made by employees of Cash America, including his supervisor, Bill Ewing, to the effect that he would receive an incentive-bonus payment pursuant to the terms of the 1994 bonus plan if he agreed to accept a position as a regional manager. Applying the performance factors of the 1994 bonus plan, Sparks calculated his bonus for the first nine months of 1995 to exceed $32,000. The actual bonus Sparks received for that period was $7,500. Sparks claimed an out-of-pocket loss of $25,000 and claimed unspecified damages for mental anguish.

Cash America claimed that the 1994 bonus plan contained both objective factors and discretionary factors and that the $7,500 bonus award had been based in part on the "discretionary" factors. Cash America also claimed that

Sparks was never promoted to the position of regional manager over all of Cash America's Division Five locations, but served only as an assistant to the vice president of that division, with supervisory authority over only half the stores in that division. Thus, Cash America claimed that the payment of the bonus was discretionary and that Sparks was entitled only to a bonus for the stores that he directly supervised within the region.

On March 18, 1998, Cash America moved for a summary judgment as to all of Sparks's claims. The trial court granted the motion with regard to Sparks's count alleging conversion of currency, but denied the motion as to all other claims. A jury trial began on June 2, 1998. Sparks rested his case on June 5, 1998. Cash America moved for a judgment as a matter of law ("JML"), pursuant to Rule 50(a), Ala. R. Civ. P. The court granted the motion as to counts 1, 2, 3, and 10 of Sparks's amended complaint—these counts contained Sparks's claims relating to his 1994 relocation and also the conversion claim that had remained after the court had entered the summary judgment. The breach-of-contract and fraud claims relating to Sparks's 1995 incentive-bonus payment went to the jury. The judge charged the jury on the law of promissory fraud and intentional suppression, specifically as it related to the incentive-bonus plan and the calculation of the bonus payments.

On June 5, 1998, the jury returned a verdict in favor of Sparks and against Cash America, awarding $150,000 in compensatory damages and $1 million in punitive damages. The jury found in favor of Ewing, Sparks's direct supervisor. On the same day, the court entered a judgment on the jury verdict. On June 19, 1998, Cash America moved for a JML or, in the alternative, a remittitur or a new trial.

The trial court heard Cash America's post judgment motion on July 10, 1998. The court, by an order dated August 7, 1998, granted the motion for a remittitur. The order purported

to reduce the award to $75,000 in compensatory damages and $225,000 in punitive damages, for a total damages award of $300,000. However, it. its order the court did not permit Sparks to accept or to reject the remittitur. Rule 59 (f), Ala. R. Civ. P., permits a court to grant a conditional remittitur:

> "(f) *Remittitur.* The court may, on motion for new trial, require a remittitur as a condition to the overruling of the motion for new trial; and, the acceptance of such remittitur by the plaintiff shall not, on appeal by the defendant, prejudice the plaintiff's right to seek reinstatement of the verdict in its full amount .

Thus, the plaintiff may choose either to accept or to reject the remittitur. If the plaintiff accepts the remittitur, then the jury's award is reduced accordingly. If the plaintiff rejects the remittitur, then the defendant is granted a new trial. The trial court neglected to give Sparks the option to accept or to reject the remittitur.

At 11:33 a.m. on August 26, 1998, Cash America filed a motion to alter or amend the court's August 7 order to give Sparks an election. Cash America requested that the August 7, 1998, order be "altered, amended, modified or reissued" to ensure the validity of the order and also requested "such other, further, and different relief as justice may require." At 3:41 p.m. that same day, Sparks filed a notice of appeal from the August 7 order. On August 27, 1998, Sparks filed a motion requesting the trial court to affirmatively "strike defendants' motion to alter or amend" and requesting that Cash America's motion be "held for naught." The court denied Sparks's motion. On August 31, 1998, the trial judge "amended" his August 7 order in which he had ordered a remittitur of the awards. The court amended the order so as to give Sparks until September 14, 1998, to accept the remittitur; otherwise, the amendment provided, Cash America would get a new trial. Sparks pursued his appeal. This Court stayed the August 31, 1998, order to the extent it required

Sparks to elect by September 14 to accept or to reject the remittitur. Cash America cross-appealed.

Sparks asserts that the August 7, 1998, order was legally defective because it did not expressly give Sparks the right to elect whether to accept the remittitur. Moreover, Sparks asserts, because he had appealed from that order before the trial court attempted to amend it, the amendment had no effect. Therefore, Sparks argues, both the order of August 7 and the order of August 31 are void, and the June 5 judgment, in the full amount of the verdict, must stand. We disagree.

The original order ruling on Cash America's post judgment motion is not void. However, the order purporting to amend the judgment to allow Sparks the right to reject the remittitur and choose instead a new trial has no effect, because that original order had already been appealed before the trial court entered the order purporting to amend it. See generally *Ex parte Dowling*, 477 So. 2d 400, 404 (Ala. 1985)

On its cross-appeal, Cash America asks this Court to reverse the original judgment of the trial court and render a judgment in its favor. Cash America contends that it was entitled to a JML on the counts that went to the jury, specifically, Sparks's breach-of-contract and fraud claims. Cash America argues that Sparks's claims relating to the payment of his 1995 incentive bonus should have been dismissed, as a matter of law, because Cash America, it argues, was not contractually obligated to pay Sparks a specific bonus amount. Cash America argues that Sparks presented no evidence to prove any of the elements of promissory fraud or fraudulent suppression and that the award of punitive damages is not supported by clear and convincing evidence. We disagree.

The trial court considered these contentions on several occasions—on pretrial motions for summary judgment; on motions for a JML after the close of the plaintiff's case; and

at the close of all the evidence. The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts. See *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997).

Thus, the judgment in favor of Sparks and against Cash America, as remitted in accordance with the trial court's order of August 7, 1998—the judgment that is the basis of the cross-appeal—is due to be affirmed. However, because Sparks had filed his notice of appeal from the remittitur order before the trial court attempted to "alter or amend" that order to include language allowing Sparks to elect a new trial, Sparks must be allowed the right to accept or to reject the remittitur. Consequently, the judgment of the trial court is affirmed on the condition that Sparks file with this Court within 28 days of the date of this opinion an acceptance of a remittitur of the compensatory-damages award from $150,000 to $75,000 and a remittitur of the punitive-damages award from $1 million to $225,000; otherwise, the judgment will be reversed and the cause remanded for a new trial. *McCormick v. Alabama Power Co.*, 293 Ala. 481, 306 So. 2d 233 (1975); *B & M Homes, Inc. v. Hogan*, 347 So. 2d 1313 (Ala. 1977).

APPLICATION OVERRULED; OPINION OF OCTOBER 27, 2000, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY.

Hooper, C. J., and Maddox, Houston, Cook, See Lyons Brown, Johnstone, and England, JJ., concur.

(2)

Supreme Court, U.S.
FILED
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No. 00-1506

In The

Supreme Court of the United States

CASH AMERICA INTERNATIONAL, INC.
AND CASH AMERICA OF ALABAMA, INC.,

Petitioners,

v.

KEVIN SPARKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Cash America raised any constitutional issue in the proceedings below or preserved any federal question for review.

2. Whether the Alabama Supreme Court opinion rests on adequate state grounds and whether the question of the proper standard of review for an award of punitive damages is well settled.

3. Whether Cash America's right to due process was violated or infringed in any way.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

STATEMENT OF DISPUTED AND/OR OMITTED FACTS 3

REASONS FOR DENYING THE PETITION 7

1. Cash America did not raise any constitutional issue in the proceedings below or preserve any federal question for review. 7

2. The Alabama Supreme Court opinion rests on adequate state grounds and the question of the standard of review for an award of punitive damages is well settled 9

3. Cash America's right to due process was not violated or infringed in any way. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

BMW of North America v. Gore, 116 S. Ct. 1589 (1995) 4, 5, 7, 11, 12, 13

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., U.S. S. Ct. Petition No. 992035 (May 14, 2001) 10, 11

F.G. Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709 (1897) 9

Fox Film Corp. v. Muller, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935) 10

Herndon v. Georgia, 1935 S. Ct. 475, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) 9

Honeyman v. Hannan, 300 U.S. 14, 57 S. Ct. 350, 81 L. Ed. 476 (1937) 10

Lynch v. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934) 10

Mutual Life Insurance Company v. McGrew, 1903 S. Ct. 61, 188 U.S. 291, 47 L. Ed. 480, 23 S. Ct. 375 (1903) 9

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 10

Sayward v. Denny, 158 U.S. 180, 39 L. Ed. 941, 15 Sup. Ct. Rep. 777 (1895) 9

Talent Tree Personnel Servs., Inc. v. Fleenor, 703 So. 2d 917 (Ala. 1997) 6

Wal-Mart Stores, Inc. v. Goodman, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000) 11

Zadig v. Baldwin, 166 U.S. 488, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 639 (1897) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Alabama Code § 6-11-24 (1975) 9, 12, 13

Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85-87 10

BRIEF IN OPPOSITION

Kevin Sparks (who may be referred to hereinafter as "Sparks") respectfully petitions this Honorable Court to deny Cash America's petition for writ of certiorari to review the judgment of the Alabama Supreme Court in *Kevin Sparks v. Cash America International, Inc., et al.*, 2000 WL 1880336 (Ala. Dec. 29, 2000) and the judgment of the trial court which is re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

OPINIONS BELOW

The Alabama Supreme Court issued the opinion that is the basis of this appeal on December 29, 2000. The opinion is published at 2000 WL 1880336 (Ala. Dec. 29, 2000) and re-printed in the Appendix to Cash America's Petition for Writ of Certiorari. The opinion and order of the Mobile County Circuit Court is unpublished but has been re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Plaintiff, Kevin Sparks, filed the instant lawsuit against Cash American International, Inc., Cash America of Alabama, Inc. (hereinafter Cash America), and Bill Ewing, alleging fraudulent misrepresentation, fraudulent suppression, breach of contract and other causes of action on March 3, 1997. At the end of a four day trial the court charged the jury on breach of contract and fraud, the

elements of mental anguish and emotional distress, and punitive damages. (R-894-903). On June 5, 1998, after deliberating for most of the afternoon, the jury returned a verdict in favor of the Plaintiff and against Cash America in the amount of one million one hundred and fifty thousand dollars ($1,150,000.00). (R-927). The jury assessed compensatory damages at $150,000.00 (which the parties agree included approximately $25,000.00 for actual economic loss and $125,000.00 for mental anguish) and punitive damages in the amount of $1,000,000.00. (R-927).

On June 19, 1998, Cash America filed a Motion for Judgment as a Matter of Law, Or in the Alternative, For a Remittitur or New Trial. (C-885). Cash America asserted that the punitive damage award was excessive and the mental anguish component of the compensatory damage award should be remitted or vacated.

On July 10, 1998, the trial court held a brief hearing on Cash America's motions and on August 7, 1998 the court entered an order remitting the compensatory damage award to $75,000.00 and the punitive damage award to $225,000.00, thereby reducing the total award to $300,000.00 (R-3-43, C-1150). The trial court unconditionally denied Cash America's motion for new trial and for judgment as a matter of law, yet granted the motion for remittitur. The order did not give Sparks the option of rejecting the remittitur and requesting a new trial as is required under Alabama law. (C-1150). Several other post-trial motions were filed in an effort to urge the trial court to correct its deficient order and both parties eventually filed appeals to the Alabama Supreme Court on procedural and substantive grounds.

On November 27, 2000 the Alabama Supreme Court released a *per curiam* opinion which affirmed the decision of the trial court conditioned upon the trial court granting Sparks the option of requesting a new trial as an alternative to the remittitur. Both parties subsequently filed applications for rehearing. Sparks petitioned for rehearing based upon the fact that the Alabama Supreme Court did not review the reduction of the award of compensatory damages by the trial court. Cash America's Application for Rehearing was based largely upon factual issues and did not address any constitutional provision, federal question, or any issue which it now raises in its Petition for Writ of Certiorari to this Honorable Court. On December 29, 2000 the Alabama Supreme Court withdrew the November 27, 2000 opinion and substituted a new opinion which was almost identical to the original opinion except that it ordered a new trial unless Sparks accepted the remittitur within twenty-eight days, effectively taking the responsibility of correcting the deficient order away from the trial court. The opinion stated that the award of punitive damages, which was considered by the trial court in pre-trial and post-trial motions, was supported by clear and convincing evidence. (Pages 18a-23a, Cash America's Petition for Writ of Certiorari).

STATEMENT OF DISPUTED AND/OR OMITTED FACTS

Sparks has previously provided a detailed Statement of Facts to this Honorable Court in his Conditional Cross-Petition for Writ of Certiorari (No. 00-1654) which was

docketed on May 2, 2001. Therefore, Sparks will include only those facts which are disputed or which have been omitted from Cash America's Petition for Writ of Certiorari.

After the trial of this matter Cash America filed a Motion for Judgment as a Matter of Law, Or in the Alternative, For a Remittitur or New Trial requesting that the trial judge reduce the jury verdict awarded to Sparks based upon various grounds. Both parties filed thorough written briefs and supporting documentary evidence prior to the hearing. The trial court carefully considered the evidence at the hearing and eventually issued a seventeen (17) page written order outlining every factor related to the reasonableness of a punitive damage award enunciated in this Court's opinion in *BMW of North America v. Gore*, 116 S. Ct. 1589 (1995).

Contrary to Cash America's assertion that the trial judge "found none of the aggravating factors which would support a significant sanction in addition to the compensatory damages" the trial court stated "that the testimonial and documentary evidence presented at trial was sufficient to support the Plaintiff's claims for fraud and breach of contract and that there was evidence from which a jury could reasonably infer that the Defendants' conduct was gross, oppressive, or malicious justifying an award of punitive damages." (Pages 4 and 3a, Cash America's Petition for Writ of Certiorari). The trial court did not find that there was no element of reprehensibility, only that Cash America's conduct was not reprehensible enough to sustain the original punitive verdict of one million dollars. In its remittitur order the trial court

addressed: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; (3) a comparison of the amount of the jury's verdict with civil or criminal penalties that could have been imposed under the law for comparable misconduct; (4) the harm likely to occur and the harm that actually occurred as a result of the defendant's conduct; (5) the financial gain to the defendant from its behavior; (6) the financial position of the defendant; (7) the expense of litigation; (8) any available criminal sanctions; and (9) similar civil actions against the defendant. (Pages 1a-17a, Cash America's Petition for Writ of Certiorari). After conducting a thorough analysis pursuant to *BMW of North America v. Gore*, 116 S. Ct. 1589 (1995) the trial court concluded that the punitive damage award of one million dollars ($1,000,000.00) was grossly excessive and therefore reduced the award to two hundred twenty-five thousand dollars ($225,000.00) based upon the factors listed above.

Both parties appealed from the trial court's remittitur order and the Alabama Supreme Court affirmed the award of compensatory and punitive damages conditioned upon Sparks' acceptance of the remittitur. In its brief to the Alabama Supreme Court, Cash America agreed that the trial court's remittitur order, which substantially reduced the punitive damage award, was "well-reasoned and thorough" and that the trial judge presided over the case with "considerable attentiveness." (Page 64, Cash America's Brief to the Alabama Supreme Court).

It is evident that the Alabama Supreme Court relied, at least to some extent, upon the trial judge's "well

reasoned and thorough" order in affirming the punitive damage award in a *per curium* opinion. The Alabama Supreme Court wrote:

> On its cross-appeal, Cash America asks this Court to reverse the original judgment of the trial court and render a judgment in its favor. Cash America contends that it was entitled to a JML [Judgment as a Matter of Law] on the counts that went to the jury, specifically, Sparks's breach-of-contract and fraud claims. Cash America argues that Sparks's claims relating to the payment of his 1995 incentive bonus should have been dismissed, as a matter of law, because Cash America, it argues, was not contractually obligated to pay Sparks a specific bonus amount. Cash America argues that Sparks presented no evidence to prove any of the elements of promissory fraud or fraudulent suppression and that the award of punitive damages is not supported by clear and convincing evidence. We disagree.
>
> The trial court considered these contentions on several occasions – on pretrial motions for summary judgment; on motions for a JML after the close of the plaintiff's case; and at the close of all of the evidence. The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts. See *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997).

Although the Alabama Supreme Court did not conduct a line-by-line analysis of the punitive damage award, it clearly reviewed the record and the trial judge's "well-reasoned and thorough" seventeen (17) page remittitur order in affirming the award.

After the original Alabama Supreme Court opinion was released on November 27, 2000 both parties filed applications for rehearing. Sparks filed his application because the court did not address the reduction of the mental anguish component of the jury verdict. Cash America petitioned for rehearing largely based upon factual issues and sufficiency of the evidence grounds. Cash America's Application for Rehearing **did not raise any constitutional issue and did not cite any federal authority at all.** (App. 1-App. 8).

REASONS FOR DENYING THE PETITION

1. Cash America did not raise any constitutional issue in the proceedings below or preserve any federal question for review.

In its original appeal brief to the Alabama Supreme Court, Cash America did not raise any constitutional question and did not allege that its right to due process was denied by the trial court and/or would be further denied unless the court conducted a line-by-line punitive damages analysis. The *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), case was cited in Cash America's original appeal brief largely for the proposition that Sparks did not present sufficient evidence to sustain an award of punitive damages. However, both the trial court

and the Alabama Supreme Court disagreed when they each stated that there was "substantial evidence" from which a jury could conclude that Cash America breached its contract with Sparks and fraudulently suppressed facts that it had a duty to disclose.

Furthermore, after the court released its original opinion on October 27, 2000 Cash America filed an application for rehearing. Cash America's application did not address any constitutional issue or federal question, raise any due process argument, or cite any federal statute or authority whatsoever. The language in the October 27, 2000 opinion relating to the award of punitive damages, which is excerpted above, is identical to the language in the December 29, 2000 opinion that was released on rehearing. The only change in the opinion was that the Alabama Supreme Court ordered Sparks to file a remittitur unless he wanted to have a new trial granted instead of leaving it to the trial court to make that order as in the October 27, 2000 opinion. Therefore, Cash America had ample opportunity after the release of the October 27, 2000 opinion to raise the due process argument that it now raises but utterly failed to do so. Instead, Cash America opted to make sufficiency of the evidence arguments as it did in its original appeal brief. A copy of Cash America's application for rehearing to the Alabama Supreme Court has been reprinted in the appendix to this brief for your review. The application does not reference a single federal issue.

This Honorable Court has repeatedly held that it will take jurisdiction of a case only when a federal question or constitutional issue was raised and decided in the court below, not when it simply might have been raised. *See*

Mutual Life Insurance Company v. McGrew, 1903 S. Ct. 61, 188 U.S. 291, 47 L. Ed. 480, 23 S. Ct. 375 (1903); *Sayward v. Denny*, 158 U.S. 180, 39 L. Ed. 941, 15 Sup. Ct. Rep. 777 (1895); *Zadig v. Baldwin*, 166 U.S. 488, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 639 (1897); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709 (1897). Furthermore, this Court has held that an attempt to raise a constitutional issue in a state appeals court in an application for rehearing is too late unless the constitutional issue could not have been anticipated. *Herndon v. Georgia*, 1935 S. Ct. 475, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935). The present case presents a clearer argument for this Court to refuse to take jurisdiction because Cash America failed to even mention a constitutional issue in its application for rehearing.

2. The Alabama Supreme Court opinion rests on adequate state grounds and the question of the standard of review for an award of punitive damages is well settled.

The law concerning the appropriate standard of review for an award of punitive damages is well settled in Alabama. Alabama Code § 6-11-24 (1975) states:

> (a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.
>
> (b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence.

Contrary to what Cash America argues in its petition for certiorari, Alabama already has a long-standing *de novo* standard of review for punitive damage awards which is in line with the recent *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001) case. Alabama appellate courts have been reviewing punitive damage awards under a *de novo* standard since Alabama Code § 6-11-24 (1975) was enacted in 1987, which is long before *Cooper v. Leatherman* was decided. *Id.*

Just as it is a well established principal that it must affirmatively appear from the record that a federal question was presented to the highest court of the state in order for this Court to assume jurisdiction of a case, it is also established that this Court will decline to review state court judgments which rest on independent and adequate state grounds. *See Honeyman v. Hannan*, 300 U.S. 14, 18 (1937); *Lynch v. New York*, 293 U.S. 52 (1934); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85-87. In the present case, the decision of the Alabama Supreme Court rests upon adequate state grounds and which do not conflict with federal law.

3. Cash America's right to due process was not violated or infringed in any way.

By Cash America's own admission the trial judge was very "attentive" and conducted a "well-reasoned and thorough" review of the punitive damage award. After the one million one hundred fifty thousand dollar ($1,150,000.00) verdict was rendered by a jury both parties submitted extensive briefs and argued the matter at a

hearing. The trial judge then issued his "well-reasoned and thorough" seventeen (17) page order which outlined each and every *BMW v. Gore* factor and resulted in an extensive reduction of the compensatory and punitive awards to three hundred thousand dollars ($300,000.00). The Alabama Supreme Court subsequently reviewed the record and the trial judge's "thorough" remittitur order and conditionally affirmed the award. The Alabama Supreme Court held:

> The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts.

Just because the Alabama Supreme Court opinion did not contain a line-by-line analysis of each and every *BMW v. Gore* factor does not mean that it did not review the matter *de novo* and render its opinion accordingly. As Cash America points out in its petition for writ of certiorari, the Alabama Supreme Court is eminently aware of its responsibilities with regard to reviewing punitive damage awards for excessiveness since *BMW v. Gore*. *See Wal-Mart Stores, Inc. v. Goodman*, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000). In fact the *Wal-Mart* case, which Cash America cites for this proposition, was decided the week before the case which is under consideration here was released. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001), which Cash America relies upon for the proposition that it was denied due process, the trial court

declined to reduce the punitive damages award. However, in the present case the trial judge gutted the original jury verdict, reducing it by over eight hundred thousand dollars ($800,000.00). Furthermore, unlike the appeals court in *Cooper*, the Alabama Supreme Court reviewed the award of punitive damages *de novo* pursuant to Alabama Code § 6-11-24 (1975), found that there was "substantial evidence" to support the award, and conditionally affirmed the case on procedural grounds. Sparks is aware of no authority that requires an appeals court to even issue a written opinion or to issue an opinion containing a line-by-line analysis of an award of punitive damages. It should suffice that the trial judge issued a "thorough and well-reasoned" remittitur order outlining each and every *BMW* factor, which the Alabama Supreme Court reviewed along with the record, in conditionally affirming the award. If there is any state appeals court in the land that is familiar with its obligations under *BMW* surely it is the Alabama Supreme Court. Cash America should not be heard to complain of alleged due process violations when the trial court substantially reduced the verdict to begin with and the Alabama Supreme Court reviewed the case *de novo*.

CONCLUSION

Cash America did not preserve its right to have its appeal heard by this Honorable Court because it failed to raise any constitutional due process argument in its original appeal brief and failed to raise any such argument in its application for rehearing which it filed after the October 27, 2000 Alabama Supreme Court opinion was

released. Cash America cannot be heard to complain about its right to due process for the first time on appeal to the United States Supreme Court. Additionally, Alabama adopted a *de novo* standard of review in 1987 when it enacted Alabama Code § 6-11-24 (1975). There is no conflict between Alabama state law and federal law on this subject and Alabama Code § 6-11-24 (1975) is consistent with this Honorable Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001). Furthermore, the trial court and the Alabama Supreme Court conducted a review of the punitive damage award and both found that it was supported by "substantial evidence." Wherefore, Sparks respectfully requests that this Honorable Court deny Cash America's petition for writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

Case No. 1972125

KEVIN SPARKS,
Appellant/Cross-Appellee,

vs.

CASH AMERICA INTERNATIONAL, INC., et al.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
CIVIL ACTION NUMBER CV-97-683

APPLICATION OF CASH AMERICA INTERNATIONAL, INC. AND CASH AMERICA, INC. OF ALABAMA FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. SALIENT FACTS 1

III. ARGUMENT 2

1. *Talent Tree v. Fleenor* does not apply 3

2. Law applicable to incentive bonus plans 4

3. Sparks's Fraud claims cannot be sustained ... 5

4. Sparks's mental anguish claim unsupported in the Record 6

IV. CONCLUSION 6

TABLE OF AUTHORITIES

PAGE

CASES

Arby's, Inc. v. Cooper,
454 S.E. 2d 488 (Ga. 1995) 5

Crowder v. Memory Hill Gardens, Inc.,
516 So. 2d 602 (Ala. 1987) 5

Elmore, Quillian & Co. v. Parish Bros.,
170 Ala. 499, 54 So. 203 (1911) 4

Goodyear Tire & Rubber Co. v. Washington,
719 So. 2d 774 (Ala. 1998) 5

Johnson v. Merrill Lynch, Pierce, Fenner & Smith,
394 So. 2d 56 (Ala. Civ. App. 1981) 4

Kmart Corp. v. Kyles,
723 So. 2d 572 (Ala. 1998) 6

Martin v. American Medical Int'l, Inc.,
516 So. 2d 640 (Ala. 1987) 5

Mutual Savings Life Ins. Co. v. Montgomery,
347 So. 2d 1327 (Ala. 1977) 4

Patterson v. Brooks,
285 Ala. 349, 232 So. 2d 598 (1970) 4

Purcell Co. v. Spriggs Enterprises, Inc.,
431 So. 2d 515 (Ala. 1983) 5

Talent Tree Personnel Services, Inc. v. Fleenor,
703 So. 2d 917 (Ala. 1997) 1, 3

OTHER AUTHORITIES

Ala. Code § 8-24-1..... 3

I. INTRODUCTION

Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, Cash America of Alabama, Inc. and Cash America International, Inc. (collectively, "Cash America") respectfully submit this application for a rehearing of this court's October 27, 2000 opinion, as that opinion relates to Cash America's cross-appeal. *Talent Tree Personnel Services, Inc. v. Fleenor*, 703 So.2d 917 (Ala. 1997), relied upon exclusively by the court in rejecting Cash America's cross-appeal, is a sales commission case and is therefore not applicable to this incentive bonus case. Cash America respectfully asserts that there is no substantial evidence in the Record to support Kevin Sparks's ("Sparks") claims for breach of contract and/or intentional fraud, and insufficient evidence in the Record to support his mental anguish and punitive verdict as remitted. Cash America urges the Court to apply the law to the following facts:

II. SALIENT FACTS

1. Sparks's lawsuit centers on an incentive bonus plan, as Sparks, along with every other witness, admits. (C-332, 406-407; R-476-477; 492-493; 525-526) Sparks has never claimed that he was entitled to earned sales commissions. (C-263; R-211, 304-305, 420)

2. Bill Ewing, Sparks's supervisor and the sole individual defendant below, was expressly found innocent of any wrongdoing and exonerated by the jury. (R-927)

3. Sparks testified that Cash America's home office never "hid" *anything* from him. (R-212, 235, 327-329)

4. Terry Kuntz was not called as a witness at trial, and thus there was *no* evidence of Kuntz's state of mind (and therefore of Cash America's intent) at the time Kuntz allegedly made a false promise to Sparks.

5. Sparks expressly testified that he *never relied*, in any fashion, upon receiving a bonus in excess of $24,000, and Cash America expressly disagreed to pay Sparks a bonus in excess of $24,000 (R-330-332, 589)

6. Sparks's "mental anguish" is based solely on his testimony that he "felt like somebody had cut [his] arms and legs off" after *receiving* a $7,500 bonus. (R-213-214, 238) Sparks's subsequent visits to Thomas Hospital were unrelated to the instant claim, according to Sparks's treating physician. (C-1232, 1241-1244)

III. ARGUMENT

This Court's October 27, 2000 decision focuses on the procedural question of whether the trial judge's August

7, 1998 remittitur order was "void" and concludes correctly that Sparks is not entitled to reinstatement of the initial $1.15 million jury verdict.

As regards Cash America's substantive cross-appeal, however, Cash America respectfully submits that this Court's decision in incorrect and unclear. The Court's reliance on *Talent Tree Personnel Services, Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997), clearly is misplaced. The facts of the instant case affirmatively demonstrate that Sparks did not prove his case and that the Court did not strictly scrutinize Sparks's mental anguish award. Further, by affirming Sparks's breach of contract "and/or" suppression claim(s), this Court has created uncertainty as to what claims were affirmed based on what evidence.

1. *Talent Tree v. Fleenor* does not apply

The *Talent Tree* case is a breach of contract and fraud case brought because the defendant intentionally cheated the plaintiff out of significant *earned sales commissions* payable based on a percentage of sales. This Court noted, "most of [Fleenor's] salary came from commissions that she earned . . . " *Talent Tree*, 703 So. 2d at 919. The Legislature has enacted a statute to protect a salesperson's right to a commission, *Ala. Code* § 8-24-1 *et seq.* (1975).

Sparks's claims, by contrast, are based on a discretionary incentive bonus plan. This Court should apply the well settled Alabama law applicable to incentive bonus plans, or risk turning this aspect of Alabama employment law on its head.

2. Law applicable to incentive bonus plans

Incentive bonus plans which are based at least in part on the employer's discretion, such as the 1994 Kuntz plan under which Sparks has sued, are unenforceable executory obligations and will not support an action. *Elmore, Quillian & Co. v. Parish Bros.*, 170 Ala. 499, 54 So. 203 (1911); *Patterson v. Brooks*, 285 Ala. 349, 232 So. 2d 598 (1970); *Johnson v. Merrill Lynch, Pierce, Fenner & Smith*, 294 So. 2d 56 (Ala. Civ. App. 1981).

In Alabama, an employee cannot enforce an employer's promise to pay an incentive bonus unless the bonus is for a *specified sum certain. Mutual Savings Life Ins. Co. v. Montgomery*, 347 So. 2d 1327 (Ala. 1977). Thus, executory contracts to "agree to agree" are not enforceable. *Parish Bros., supra.* The Kuntz bonus plan did not create a contract until, if at all, Sparks received and accepted his $7,500 incentive check. *Patterson v. Brooks*, supra.

Cash America never agreed, and, in fact, specifically refused to pay Sparks an incentive bonus of $24,205; $24,895; or $33,200. Thus, Sparks's breach of contract claim, as well as his fraud claims, must fail as a matter of law.

In *Arbys, Inc. v. Cooper*, 454 S.E. 2d 488 (Ga. 1995), our sister state's highest court reviewed a case presenting the *precise* factual and legal matters as in the case at bar. The Georgia Supreme Court entered judgment for the employer:

> In this case, the basis for rendering certain the bonuses promised to Cooper is at least in part afforded by a future exercise of discretion. In

> such circumstances, the promise to pay a bonus in the future, amounts to a promise to change the terms of compensation in the future and, thus, is an unenforceable executory obligation.

Arby's, 454 S.E. 2d at 489 (emphasis added). The *Arby's* decision is consistent with Alabama law and all of Sparks's claims should be reversed.

3. Sparks's fraud claims cannot be sustained

Under this Court's authority in *Goodyear Tire & Rubber Co. v. Washington*, 719 So. 2d 774 (Ala. 1998); *Martin v. American Medical Int'l, Inc.*, 516 So. 2d 640 (Ala. 1987); *Crowder v. Memory Hill Gardens, Inc.*, 516 So. 2d 602 (Ala. 1987); and *Purcell Co. v. Spriggs Enterprises, Inc.*, 431 So. 2d 515, 519 (Ala. 1983), among other cases, Sparks's (intentional) fraud claims cannot be sustained. Sparks adduced no evidence that he reasonably relied upon a false promise or suppression, and no evidence of any present intent to deceive him. Sparks's fraud claims should be reversed along with his punitive damages verdict.

4. Sparks's mental anguish claim unsupported in the Record

This Court now strictly scrutinizes mental anguish claims in the nonpersonal injury context. *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998). In its October 27, 2000 decision, this Court did not address the dearth of evidence to support Sparks's mental anguish verdict of $125,000 as remitted by the trial court to $50,000. The evidence in the Record demonstrates that Sparks's mental

anguish evidence was scant, at best, and was not corroborated by his treating physician. Cash America respectfully submits that Sparks's mental anguish verdict should be reversed based on *Kmart Corp. v. Kyles, supra.*, or substantially remitted below $50,000 with a concomitant reduction in the punitive award.

IV. CONCLUSION

Based on the foregoing, Cash America requests a rehearing on its cross-appeal. At the very least, Cash America requests clarification as to which of Sparks's claims have been sustained, based on what evidence, and which claims are subject to a re-trial. Cash America respectfully requests such other, further and different relief as justice may require.

Respectfully submitted,

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No. ~~00-1054~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CASH AMERICA INTERNATIONAL, INC. AND
CASH AMERICA, INC. OF ALABAMA,
Petitioners,

v.

KEVIN SPARKS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

No. 00-1654

CASH AMERICA INTERNATIONAL, INC. AND
CASH AMERICA, INC. OF ALABAMA,
Petitioners,

v.

KEVIN SPARKS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' REPLY BRIEF

Petitioners Cash America International, Inc. and Cash America, Inc. of Alabama (collectively, "Cash America") reply briefly herein to respondent Kevin Sparks's ("Sparks") brief in opposition to Cash America's petition for a writ of certiorari. Sparks has offered no persuasive argument against issuance of the writ; indeed, following the release of this Court's decision in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, ___U.S.___, 121 S. Ct. 1678 (2001), which mandates independent *de novo* appellate review of punitive awards for excessiveness, Cash America's case for the writ is even more compelling.

Sparks's principal argument in opposition to Cash America's petition appears to be that Cash America did not properly preserve the federal constitutional issue now before this Court. Specifically, Sparks claims:

> In its original appeal brief to the Alabama Supreme Court, [Cash America] did not raise any constitutional question and did not allege that its right to due process was denied by the trial court . . .

(Sparks's opposition brief at 7). This is not accurate. The appendix to this reply brief sets out that portion of Cash America's initial appeal brief to the Alabama Supreme Court, specifically arguing in detail that the punitive verdict in this case was constitutionally excessive and should be substantially remitted under the guidelines announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Accordingly, it is clear that Cash America did properly preserve the constitutional issue currently before this Court. This Court should reach the merits of Cash America's petition.[1]

Sparks's next argument, that at the time this case was before the Alabama Supreme Court, Alabama had a statute requiring *de novo* appellate review of punitive awards, (*Ala. Code* § 6-11-24(b) (1975)) is simply wrong. (Sparks's opposition brief at 9-10). This statute was enacted by the Alabama Legislature in 1987 as part of a package of tort reform legislation; however, the above provision requiring appellate courts to independently reassess punitive damages verdicts was declared unconstitutional by the Alabama Supreme Court in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991). (*See* Cash America's petition at 9-10, n. 4). And in any event, the Alabama

---

[1] Sparks also argues that Cash America did not reference any federal constitutional provisions in its application for a rehearing to the Alabama Supreme Court, even though that application did state, "Cash America respectfully asserts that there is . . . insufficient evidence in the record to support [Sparks's] . . . punitive verdict as remitted." (*See* Sparks's opposition brief at app. 3). Cash America addressed several other issues in its application, as did the successful petitioners in *Cooper Industries, supra*, U.S. S. Ct. Petition No. 99-2035.

Supreme Court in the present case undertook no review whatsoever of Sparks's punitive award. Sparks stresses that the trial court did undertake an extensive review of his award, but that fact is irrelevant for the present purposes.

The Alabama Supreme Court has now acknowledged that it must apply an independent, *de novo* standard in reviewing punitive awards. *Acceptance Ins. Co. v. Brown*, 2001 WL 729238, Nos. 1991938, 1992026 (Ala. June 29, 2001). In *Brown*, the Alabama Supreme Court stated:

> Recently, in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, ___U.S.___, 121 S. Ct. 1678 (2001), the United States Supreme Court addressed the question whether an appellate court should review a trial court's punitive damages award according to an abuse of discretion standard or according to a *de novo* standard . . . [T]he Court held "that courts of appeals should apply a *de novo* standard of review when passing on [a trial court's] determination of the constitutionality of punitive damages awards." Accordingly, in light of the United States Supreme Court's recent pronouncement, we review the trial court's punitive damages award in this case *de novo*."

Id. at *24.

In considering Cash America's constitutional challenge to the excessiveness of the punitive damage fine imposed against it, the Alabama Supreme Court simply adopted the trial court's conclusions without undertaking its own review or analysis. (*See* Cash America's appendix to its petition for a writ of certiorari, app. 22a-23a). Without question, the law now requires appellate courts to undertake an independent *de novo* review of punitive awards for excessiveness, as the Alabama Supreme Court has acknowledged. Thus, Sparks's arguments about the thoroughness of the trial court's analysis are beside the point.

Cash America was entitled to appellate review of the punitive award in this case for constitutional excessiveness. The writ should issue.

Respectfully submitted,

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APPENDIX

* * * *

the aggravating factors from the *Fleenor* decision which are not present in the instant case. In *Fleenor*, unlike in the case at bar, documentary evidence proved that sales figures had been altered, crossed out and arbitrarily reduced so that plaintiff received a lower sales commission than she had earned. The trial court then thoroughly considered the *BMW* and *Hammond/Green Oil* factors [1] and significantly reduced the punitive damages. In this case, however, Judge Galanos did not go far enough in ordering remittitur.

B. Sparks's Punitive Damages Verdict Should Be Set Aside Entirely or Substantially Remitted From $225,000

An analysis of the *BMW* and *Hammond/Green Oil* factors, as performed by the trial court, demonstrates that Sparks's punitive damage verdict should be vacated in its entirety or substantially remitted. Cash America respectfully requests that this Court consider the evidence in light of the following factors and either vacate or substantially remit this punitive damages verdict well below $225,000.

(1) Lack of reprehensibility of conduct

As the trial court noted, in *BMW*, the United States Supreme Court found that the most important indicium of reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *BMW*, 116 S.Ct. at 1599. Not every punishable act is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. . . . [P]unitive damages may not be grossly out of proportion to the severity of the offense." *Id.*

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[1] *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

This is not a personal injury case. Sparks's claims are "purely economic in nature," *id.*, and involved "no death or serious bodily injury, no praying on vulnerable victims, no breach of fiduciary duty, no wicked purpose of unjust self-enrichment or malicious harm. It evinced no indifference to or reckless disregard for the health and safety of others." *Id.* Like BMW, Cash America is not a "recidivist," and there is not a scintilla of evidence or any basis for concluding that the alleged punishable conduct involved "intentional malice." *Id.*

The trial court emphasized the absence of reprehensibility in Cash America's conduct, noting the dearth of evidence of any concealment or "cover-up" of malicious conduct. Sparks argued that certain numerical notations in Ewing's day-planner indicated that Ewing intended to "steal" Sparks's bonus. The trial court concluded, however, that Ewing's dayplanner was "inconclusive." Emphasizing that Sparks never gave Cash America an opportunity to remedy the alleged wrong, the trial court wrote:

> The defendants provided the plaintiff with all the financial and statistical information related to the bonus payments which he requested. Further, the defendants attempted to meet with the plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The plaintiff admittedly refused to meet with the representatives of Cash America.

Judge Galanos found that "this factor weighs against the plaintiff in this court's analysis of the reprehensibility of the defendants' conduct." This verdict is particularly egregious when compared to other post-*BMW* cases in which this Court has ordered substantial remittitur. *See, e.g. Ford Motor Co. v. Sperau*, 708 So. 2d 111 (Ala. 1997) (remitting $6,000,000 punitive award to $1,792,000 in case involving intentional fraud which cost African-American dealer his lively-hood); *Life Ins. Co. of Georgia v. Johnson*, 701 So.2d 524 (Ala. 1997) (reducing punitive award from $5,000,000 to

$3,000,000 in case involving a defendant's statewide scheme to sell worthless medicare supplement insurance policies to "some of the most vulnerable members of our society"); *American Pioneer Life Ins. Co. v. Williamson*, 704 So.2d 1361 (Ala. 1997) (reducing punitive award from $3,000,000 to $750,000 in case involving scheme to force insurance agent to forfeit commissions because policyholder had changed to another insurer's policy).

(2) Relationship between the punitive damages and the plaintiff's injuries

As is discussed above, this is a pure economic harm case. Even accepting plaintiff's breach of contract claim, plaintiff could not have suffered more than $25,000 in compensatory damages. Plaintiff's claims for mental anguish are not supported in the Record, as discussed herein at pp. 71-76, *infra*. Cash America's conduct was innocent and, once it became apparent to Cash America that Sparks was having problems, Cash America attempted to meet with Sparks and provide him support services, but Cash America was rebuffed on several occasions.

There is no evidence of reprehensibility in this case. Having before it no evidence of reprehensibility, therefore, this Court should reverse the trial court and vacate Sparks's punitive damage award or substantially remit this verdict well below $225,000. In remitting this verdict, the trial court applied a 3:1 ratio of punitive to compensatory damages. It is respectfully submitted that, while the trial court was clearly correct in remitting this verdict, the remittitur does not go far enough. In no event would the evidence in this case support a ratio greater than 1:1 of actual compensatory damages (in no event more than $25,000) to punitive damages in view of the complete lack of aggravating factors adduced at trial.

(3) Legislatively established fines for comparable conduct

There are no legislatively established fines for failing to pay the particular discretionary incentive bonus amount demanded by an employee.

(4) Profitability of the defendants' conduct

Sparks contends that he "earned" $25,000 more than he was paid as a 1995 9-month incentive bonus. Even if Sparks were correct, any punitive damage award in excess of $25,000 would remove the alleged profitability from Cash America's conduct in setting Sparks's bonus at $7,500.

(5) Defendants' financial condition

Cash America acknowledges that it is a large corporation which could withstand the excessive punitive damage verdict without going out of business. However, Cash America notes that its financial condition was presented improperly to the jury during Sparks's counsel's closing argument in an effort to inflame the jury. This well may have been a factor in causing this jury to function improperly.

Taking into account all of the above considerations derived from *BMW* and *Hammond/Green Oil*, it is abundantly clear that no aggravating factors exist in this case which would justify the excessive punitive damage verdict, even as reduced by the trial court. The punitive damage verdict should be vacated in its entirety. Certainly, this economic harm case does not justify a punitive damage award which goes beyond the 1:1 ratio of punitive damages to actual compensatory damages, which in this case cannot be more than $25,000. Cash America respectfully requests that this Court vacate in its entirety or substantially reduce Sparks's punitive damage verdict to no more than $25,000.